

Jordan



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Modular Communications Systems, Inc.

File: B-241858

Date: March 8, 1991

Bob Moesch for the protester.
Ronald A. Duncan for Avtec Inc., an interested party.
Allen W. Smith, Forest Service, Department of Agriculture, for the agency.
Paul E. Jordan, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's award to offeror for which it apparently relaxed certain specifications was improper where reasonable possibility of prejudice to the protester is evident in low price and technical score differences between the two offerors and the protester met the specifications that were relaxed for the awardee.

DECISION

Modular Communications Systems, Inc. (Moducom) protests the award of a contract to Avtec Inc. under solicitation No. RFP-R5-14-90-96, issued by the Forest Service, Department of Agriculture, for the supply of a dispatch console system. Moducom contends that Avtec did not meet all the specifications and, thus, is not entitled to the award. It also contends that the evaluation was not conducted in accordance with the solicitation; that improper discussions were conducted with Avtec; that it was improper to solicit a second best and final offer (BAFO); and that Avtec's BAFO was so flawed that it should not have been accepted.

We sustain the protest on the first ground.

The dispatch system to be procured consists of a multiline and multiposition radio console for use in the Susanville, California, Interagency Fire Center. Offerors were required to submit technical proposals composed of a written response to each item in the specifications, including a statement of compliance or an explanation of variations and appropriate technical documentation. Offerors also were required to

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submit separate price proposals including unit and extended prices for the items to be supplied.

Proposals were to be evaluated on the basis of five criteria: Technical Specifications (400 points); Microprocessor Controlled System (200 points); Spare Parts and Future Maintenance (200 points); Experience of Company (100 points); and Training (100 points). Award was to be made to the offeror whose proposal was technically acceptable and whose technical/price relationship was most advantageous to the government.

Two offerors, Moducom and Avtec, responded by the August 1, 1990, closing date. The Technical Evaluation Board reviewed the proposals and prepared a list of items requiring clarification from each offeror. These lists were furnished to the offerors, with responses and BAFOs due on August 23. On August 22, each offeror demonstrated its equipment to the Board. The Board reviewed the proposals, offerors' responses, and the results of the demonstrations and found both offerors to be acceptable. Of 1,000 possible points, Avtec scored 880 and Moducom scored 870, a difference of slightly more than 1 percent. When the price proposals were reviewed, the Board found that it had questions regarding freight costs for Avtec and training costs for Moducom, as well as questions for both concerning what items were optional and what items were included in the contract price. The Board solicited responses to its questions and issued an amendment to clarify the requirements for training and burst tone requirements. Each offeror responded to the amendment and questions and submitted another BAFO.

Upon review of the offerors' responses, the Board found both acceptable and raised Avtec's score to 905, about 4 percent higher than Moducom's score, which remained unchanged. Since Avtec's BAFO, \$173,722, was about 4 percent lower than Moducom's BAFO price, \$181,188, and Avtec had about a 4 percent higher technical score, the Board recommended award to Avtec. After discussion with the Board, the contracting officer awarded the contract to Avtec.

Moducom requested and, with the authorization of Avtec, received a copy of Avtec's contract, including its proposal and all revisions. Upon review of these documents, Moducom filed a protest with the agency. In it, Moducom contested the evaluation and award, alleged that Avtec failed to meet certain of the specifications, and alleged that Avtec had improper communications with Forest Service personnel.

The Forest Service denied the protest. Moducom then filed a protest with our Office, attaching a copy of its agency-level protest and contesting the evaluation as well as the Forest

Service's failure to address all the original protest grounds. Performance of the contract has been suspended pending the resolution of the protest.

Moducom contends, among other things, that the award to Avtec was improper because the Board ignored some seven areas in which Avtec's proposal failed to comply with the Forest Service's specifications. Specifically, Moducom alleges that Avtec: (1) did not offer interchangeable console positions; (2) did not understand the requirements for a particular mode in the tone encoder; (3) did not provide an independent audio level adjustment for the operator; (4) did not provide a particular mute capability during transmit functions; (5) and (6) did not provide a continuously adjustable mute control as required in two specifications; and (7) did not provide for a tone encoder output that is adjustable over a specified range. Apart from stating that the evaluators were satisfied that Avtec's proposal complied with the specifications and that he would not second guess their assessment, the contracting officer made no effort to refute these allegations by Moducom.^{1/}

^{1/} In response to the protest, the Forest Service provided a copy of the solicitation; proposals; evaluation materials consisting of a typed score sheet and handwritten evaluations; procurement documents, including a chronology; and a 1-page report in which the agency expressed its belief that the evaluation was fairly performed in accordance with the solicitation and generally denied the balance of Moducom's protest. Our Office requested a more comprehensive report in accordance with our Bid Protest Regulations which require, among other things, a contracting officer's statement setting forth the findings, actions, recommendations, and any additional evidence or information deemed necessary in determining the validity of the protest, which statement "shall be fully responsive to all allegations of the protest which the agency contests." 4 C.F.R. § 21.3(i) (1990). The agency responded with a 2-page report that briefly addressed Moducom's contentions. With regard to the acceptability of Avtec's technical proposal, the supplemental report stated that the "notes of the Board's deliberations sent with the protest file are clear about the technical merits of the respective proposals. We do not find a reason to question the technical scores." While the evaluation concludes that Avtec was technically superior to Moducom, there is no attempt to explain Avtec's apparent noncompliance with several of the specifications. In addition, although as an interested party Avtec has submitted comments on Moducom's protest, it did not address the technical issues raised by the protester.

We have reviewed the agency's requirements as expressed in the solicitation; Avtec's proposal and revisions; and the Board's evaluation. In three areas (1, 2, and 4 above) we find no basis to question Avtec's compliance. For example, with regard to Moducom's second allegation, the specifications required that the tone encoder have programmable tone equipment which would apply tones of five types to the transmitting control line. Although Avtec initially omitted any specific reference to the "Mode E" tone, in a revision to its proposal, Avtec stated that it "supplies all the required tones in the 1 + 1 paging format for each console." Moducom alleges that this response indicates that Avtec does not understand the requirement since the "1 + 1" tones refer to a separate section in the specifications. Inasmuch as the specification for Mode E states that it "shall be a definable 1 + 1 sequential code format" and, in its original proposal, Avtec stated that it understood and would comply with all specifications related to Mode E, we find no basis for concluding that Avtec's reference to "1 + 1" tones indicates a lack of understanding.

With reference to the other four areas, however, we find no basis for the agency's assertion that Avtec did comply with the specifications. For example, one specification requirement for the telephone interface was that the headset earphone audio have "independent level adjustments available to the operator." In its original proposal, Avtec explained that it provided a complete "compression system to allow for automatic level control of [telephone] line audio." The Board's evaluation indicates that it did not consider this response by Avtec to comply with this specification. In response to the Board's request for clarification, Avtec stated that "separate volume controls are not required due to the dynamic range of Avtec's receive compressor amplifiers."

With regard to this alleged deviation, Moducom explains that compression amplifiers are different from independent level adjustments, which are used to equalize the level between the radio and telephone and to allow individual operators to adjust the audio level of their earpiece. Since, according to Moducom, compression amplifiers cannot be adjusted to the preference of individual operators, it argues that Avtec has not met this requirement. In the absence of any substantive explanation from the agency, a plain reading of the requirement and Avtec's original and clarifying responses indicates to us that Avtec's automatic system does not meet the requirement for independent level adjustments available to the operator.

Another example of Avtec's failure to provide for proper adjustable controls is reflected in Moducom's fifth allegation. The "receive circuitry" specifications required in

part that an "unselected" audio level "shall be continuously adjustable [within a given range] by means of a control not readily accessible to the operator." Avtec's proposal stated that its equipment provided a single volume control to adjust the level of all unselect audio, since each receive level is adjusted with an automatic level circuit. The Board's evaluation indicated that Avtec's proposal did not comply with this specification requirement. By way of clarification, Avtec explained that the "summed" (apparently, combined) unselect audio was continuously adjustable from a setting not readily available to the operator and that the mute level was not adjustable, but rather "on" or "off."

Moducom contends that a mute level that is either "on" or "off" is not "continuously adjustable" and that Avtec's single volume control does not meet the requirement that adjustments be available on individual channels. We agree. The specifications indicate that the adjustments must be available for single circuits rather than some combination of circuits and that the adjustments must be made from a control not readily accessible to the operator. In the absence of any meaningful explanation from the agency, it is not readily apparent to us how Avtec's system with a mute level that is not adjustable, but is either "on" or "off," meets the requirement for continuously adjustable muted audio levels.

In a negotiated procurement, any proposal which does not conform to the material terms and conditions of the solicitation is unacceptable and may not form the basis for an award. Roche Diagnostic Sys., Inc., B-238965, July 20, 1990, 69 Comp. Gen. ___, 90-2 CPD ¶ 56. From the context of the solicitation, the mute level controls, and other specifications with which Avtec did not comply, appear to be material and the agency has not argued to the contrary. Since Avtec was found technically acceptable by the agency, notwithstanding its noncompliance, we conclude that the agency relaxed the specifications for Avtec.

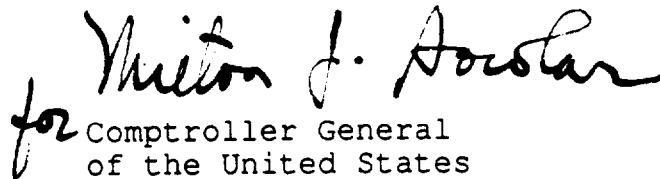
It is a fundamental rule of federal procurement law that a contracting agency must treat all offerors equally. Loral Terracom; Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182. Where, as here, material specifications are relaxed for one offeror but not the other, we will sustain a protest if there is a reasonable possibility of prejudice. See Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401.

Here, Moducom is technically acceptable in the areas where Avtec is not and its technical score is only about 4 percent lower than Avtec's. Thus, the effect of the agency's relaxation of the specifications was to prevent Moducom from

adapting its product to the revised requirements. See Roche Diagnostic Sys., Inc., B-238965, supra. Since Moducom's price is only \$7,466, or about 4 percent higher than Avtec's, we find it likely that Moducom could have improved its score and/or lowered its price through a revision of its proposal based upon the agency's relaxed specifications. We believe these circumstances establish a reasonable possibility of prejudice to Moducom and sustain the protest on that basis.

If the relaxed specifications meet the agency's needs, the solicitation should be amended accordingly and another round of BAFOs requested and award made as appropriate. Otherwise, since Avtec did not comply with the specifications as stated in the original solicitation, and Moducom, found technically acceptable by the Board, did comply with the specifications, we recommend that the contract with Avtec be terminated for the convenience of the government and that award be made to Moducom, if otherwise appropriate. Moducom is also entitled to the costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d)(1). In view of our decision to sustain the protest, we will not consider Moducom's remaining protest grounds.^{2/}

The protest is sustained.


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^{2/} Moducom's fourth protest ground concerning the contents of Avtec's second BAFO warrants some comment. Even though the number of items had been reduced from 14 to 8, Avtec's BAFO ostensibly offered 14 units. Further, it entered the same figure, \$161,722, for both the unit and extended prices. There is no evidence that the agency ever sought to clarify these obvious mistakes.